EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 120485

CASE NBR 85-1-00008 CSY
SHORT TITLE McCommon, Jerry
VERSUS Mississippi

CASE STATUS: DECIDED
DOCKETED: Jun 25 1985

Entry	Date	Note	Proceedings and Orders
1	Jun 25 1985	D	Petition for writ of certiorari filed.
2	Jul 3 1985		Waiver of right of respondent State of Mississippi to respond filed.
3	Jul 17 1985		DISTRIBUTED. September 30, 1985
5	Sep 5 1985	F	Response requested -- WJB.
6	Oct 5 1985		Brief of respondent State of Mississippi in opposition filed.
7	Oct 9 1985		REDISTRIBUTED. November 1, 1985
9	Nov 4 1985		REDISTRIBUTED. November 8, 1985
10	Nov 12 1985		Petition DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

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85- 8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JERRY McCOMMON PETITIONER

VS. NO._____

THE STATE OF MISSISSIPPI RESPONDENT

PETITION FOR WRIT OF CERTIORARI

to the Supreme Court of

the State of Mississippi

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==========

QUESTION PRESENTED FOR REVIEW

The search and seizure of the evidence in this case was in violation of the Fourth Amendment to the United States Constitution, in that (1) there was no probable cause to issue the search warrant; (2) the search warrant was based on facts that were materially false or recklessly made; (3) the search warrant was not issued by a neutral and detached magistrate. Its admission at trial requires reversal of this case.

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TABLE OF AUTHORITIES

OPINION BELOW

The Supreme Court of the State of Mississippi entered its decision affirming the conviction of Jerry McCommon on April 24, 1985, McCommon v. State, Sup. Ct. no. 55,240. As of this date, the opinion of the Court has not been published.

JURISDICTION

An opinion, as yet unpublished, was rendered by the Mississippi Supreme Court on April 24, 1985, McCommon v. State, Sup. Ct. no. 55,240. For the convenience of the Court, a typewritten copy of the opinion is attached as Appendix "A". Petition for rehearing was filed on May 7, 1985, and denied on May 15, 1985, without opinion. A copy of the Order of the Supreme Court of Mississippi denying

the Petition for Rehearing from Minute Book BX, page 521, is attached as Appendix "B".

Jurisdiction of the Court is invoked under 28 U.S.C. §1257(c).

CONSTITUTIONAL PROVISION INVOKED

AMENDMENT IV, UNITED STATES CONSTITUTION. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Acting on information from an

informer that Petitioner Jerry McCommon was to arrive in Jackson, Mississippi, on September 29, 1982, and drive to Miami, Florida, "possibly to pick up a load of drugs," members of the Jackson, Mississippi, Police Department and Mississippi Bureau of Narcotics set up surveillance, and observed McCommon arrive at the Jackson Municipal Airport, where he was met by his brother in a 1983 Mercury automobile. Eight law enforcement officers in five automobiles followed Petitioner the following day as he drove the 1983 Mercury to Miami. On October 4, officers observed the Mercury parked outside a house owned by Richard Lopez, along with a car registered to Mary (or Marie) Canovis. Several unknown persons were observed in the house with McCommon, but no criminal activity was

seen. On October 6, the officers followed McCommon in the Mercury from Florida to Mississippi, where he was stopped in Simpson County. He was arrested and his car impounded. A subsequent search pursuant to a search warrant revealed 265 pounds (four bales) of marijuana in the trunk of the automobile.

Officers obtained the search warrant for the automobile from Justice Court Judge Nevil Mangum. A copy of the Underlying Facts and Circumstances presented to the Justice Court Judge which served as the basis of the search warrant issued in this cause is attached as Appendix "C". Several of the statements contained in this document were untrue and were known by the affiants to be untrue.

The Justice Court Judge testified at a hearing on the motion to suppress that he issued the warrant based on the fact that it was requested by two sworn officers of the law, rather than anything stated in the underlying facts and circumstances.

The Fourth Amendment grounds were consistently raised throughout the procedural history of this case. A motion to suppress the evidence was filed on March 31, 1983, setting out (in part) the following:

> 2. The search and the seizure were unreasonable, more specifically, the search warrant was defective in that there was no probable cause for the issuance of said search warrant and the underlying affidavit setting forth the facts and circumstances for said search warrant was defective.
>
> 3. The subsequent search and seizure violated the

defendant's constitutional rights under the Constitution of the United States of America and the State of Mississippi.

4. The search and seizure complained of, directed at the defendant, Jerry McCommon, was made for the purpose of obtaining evidence to be used against the defendant, and the defendant has, in fact, been charged upon evidence seized as a result of said illegal search and seizure, and the defendant has standing to complain of said unreasonable, unlawful and unconstitutional search and seizure.

A hearing on the pre-trial motion to suppress the evidence seized from the trunk of McCommon's car was held on May 9-10, 1983, before the Hon. L. D. Pittman, trial judge. The motion was denied, and the case proceeded to trial.

Trial counsel renewed the motion to suppress at the time reference to the marijuana was first made by the State's first witness, and objected to the

reference to or introduction of any evidence taken from the trunk. The objection was overruled, but defendant was granted a continuing objection.

BY MR. WILKINS: Your Honor, before any further testimony is given, we would like to object to anything that was taken from the trunk of the automobile for the reasons assigned in our Motion to Suppress. We would like to renew that motion. For the record, we would like for it to reflect that there was not probable cause for the search to be made, the Underlying Facts and Circumstances were insufficient, that the Affidavit that the Search Warrant was issued on did not have a proper seal, nor was it signed by the Justice of the Peace.

BY THE COURT: Let the objection be overruled.

BY MR. WILKINS: And, Your Honor, finally, that it was issued on other than probable cause.

BY THE COURT: All right. Let the objection be overruled.

. . . .

BY MR. WILKINS: Excuse me. Your Honor, as an additional ground, that the Warrant to search the vehicle was not issued by a neutral and detached magistrate.

BY THE COURT: Let the objection be overruled.

. . . .

BY MR. WILKINS: [W]e would like a continuing objection to any reference to this--anything taken from the trunk and any reference to it whatsoever.

BY THE COURT: All right, sir. Let the record so show.

At the close of the State's case, defense counsel moved for a directed verdict and for exclusion of the evidence. The motion was denied.

> BY MR. WILKINS: Comes the Defendant, Your Honor, Jerry McCommon, by Counsel and moves the Court to exclude the evidence offered by the State of Mississippi and direct a verdict of not guilty and as grounds therefor assign . . . two, that the evidence offered

> against the Defendant was obtained as a result of an unreasonable search and seizure in violation of his State and Federal constitutional rights for the reason that there was not probable cause to issue a Search Warrant; that the Search Warrant was issued based on facts that were materially false or recklessly made; three, that some of the Underlying Facts and Circumstances relied on by the Magistrate were obtained after the Defendant had been placed in custody, but prior to receiving the Miranda Warnings; four, that the committing Magistrate was not an impartial Magistrate--impartial or detached Magistrate. . . .
>
> BY THE COURT: The motion will be overruled.

The same grounds were raised in the motion for a new trial, as follows:

> The Court erred in allowing the admission into evidence items seized from the trunk of defendant's automobile in that the evidence was illegally obtained for the following reasons:
>
> (a) The search warrant was not based on probable

cause.

(b) The search warrant was issued based on certain underlying facts and circumstances presented to the Justice of the Peace which were either false or made with a reckless disregard for the truth;

. . . .

(d) The search warrant was not issued by a neutral, unbiased, or uninterested Justice of the Peace.

The motion was denied.

On appeal of his conviction to the Mississippi Supreme Court, the Petitioner assigned as error:

> The search and seizure of the evidence in this case was in violation of Section 23 or the Mississippi Constitution and the Fourth Amendment to the United States Constitution. It was reversible error to admit the evidence obtained in this illegal search and seizure at trial.
>
> A. There was no probable cause to support the issuance of the search warrant.

> B. The search warrant was based on facts that were materially false or recklessly made.
>
> C. The search warrant was not issued by a neutral and detached magistrate.

ARGUMENT

Evidence seized in violation of the Fourth Amendment is inadmissible at trial. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). At the trial of Jerry McCommon, only law enforcement officers and one forensic scientist testified. The total evidence they produced is set out at page 5 of this petition. Because no witness saw Petitioner McCommon participating in any illegal activity, his conviction was impossible without the introduction of the evidence taken from the trunk of his vehicle. Petitioner

contends that the search of his automobile and the seizure of those items contained in the trunk of the automobile were in violation of the Fourth Amendment in three distinct ways.

A. There was no probable cause to issue the search warrant.

Agent Steve Campbell of the Mississippi Bureau of Narcotics and Officer Jerry Barrett of the Jackson Police Department produced for the Justice Court Judge a statement of underlying facts and circumstances (Appendix "C") which alleged (1) that McCommon had a prior arrest for cocaine possession, at which time there was evidence of marijuana debris in the trunk of his car; (2) that one of the affiants had been informed by a confidential source that McCommon was going to Miami

"possibly to pick up a load of drugs;" (3) that two of McCommon's friends were arrested in Alcorn County, Mississippi, for possession of marijuana using a vehicle belonging to McCommon; (4) that surveillance by affiants of McCommon verified that McCommon did travel to Miami, was observed at a residence occupied by a person "known to the Drug Enforcement Administration as a marine smuggler;" (5) that on the return trip to Mississippi, McCommon drove a vehicle which sagged in the rear and told officers that he had been to the Mississippi Gulf Coast camping. No additional information was provided to the magistrate which is not contained in the affidavit.

The informer's tip is at the very heart of a finding of probable cause to

issue a search warrant. Without it, there are only allegations that McCommon has once been arrested (not convicted), that he associates with persons who have been arrested (not convicted) and to whom he loaned his automobile on one occasion, drove to Miami and returned in a vehicle which sagged in the rear, and that he told law enforcement officers that he had been to the Mississippi Gulf Coast when, in fact, he had been to Florida. These facts, standing alone, do not constitute probable cause for the issuance of a search warrant.

The information that McCommon would be travelling to Miami "possibly to pick up a load of drugs" came exclusively from an informer. The entire text from the affidavit pertaining to the informer's tip is as follows: "A Confiential (sic)

source told Sgt. Barrett that McCommon was going to Miami, Florida, possibly to pick up a load of drugs." The affidavit does not state when the information was received by Sgt. Barrett or when the alleged trip was to take place or how the informer knew the illegal purpose of the trip to Miami. On this scant information, the issuing magistrate had no basis to believe that the tip provided by the informer was reliable, first-hand information.

When an informer's tip serves as the basis for a search warrant, this Court has said, in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), that the issuing magistrate must be informed of (1) some of the underlying circumstances from which the informer concluded that the defendant was the one

guilty of the offense, that is, the basis of the informer's knowledge, and (2) some of the underlying circumstances from which the officer concluded that the informer was credible or his information reliable, that is, the basis of the affiant's belief in the informer's reliability. Furthermore, in Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), this Court indicated that the basis-of-knowledge test could be by-passed where the tip is sufficiently detailed, self-verifying, so as to assure the magistrate that the informer was not relying on mere rumor. Although in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), this Court has held that search warrant strictures of Aguilar v. Texas and of Spinelli v. United States are to

be placed in a broader context of "totality of the circumstances," the Court made clear that Aguilar/Spinelli test is "highly relevant" in determining the value of the informer's report. Gates, supra, 103 S.Ct. at 2328-2330.

No basis-of-knowledge was established in the affidavit. No claim is asserted in the affidavit produced for the Justice Court Judge that the informer personally knew Petitioner McCommon, that he had any first-hand knowledge of any illegal activity by McCommon, had seen drugs at the home of, in the automobile of, or on the person of McCommon, had purchased drugs from McCommon, or that he knew a person who had seen or done these things. Even the use of the word "possibly" in the affidavit is certain admission by the affiants that the

informer had no intimate knowledge of illegal activity, and at most was engaging in speculation. In short, he was not an eye-witness, he had no first-hand knowledge; from the face of this affidavit the informer had no more than a hunch.

Reliability of the informer was not established. There is nothing in the statement of underlying facts and circumstances to indicate that either of the affiants knew the informer, either personally or by reputation, or that he was known by them to be reliable, or that he had given accurate information to law enforcement officers in the past.

The informer's tip, likewise, is not shown in the affidavit to be self-verifying so as to pass muster under Spinelli. There is no detailed

description of Petitioner or his alleged illegal operations as was provided by the informer in Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959), cited by Spinelli as the model of self-verifying information. The corroboration provided by surveillance of affiants amounted to no more than confirmation that McCommon did make a trip to Miami and was seen in a house "occupied" by a "known" drug smuggler. Affiants saw no drugs, not even a suspicious-looking transfer.

The affidavit provides virtually nothing from which one might conclude that the informer is either honest or his information reliable, and no factual basis for the informer's prediction regarding McCommon's possible future criminal activities.

Gates did not hold that basis-of-knowledge and reliability may be totally absent from the affidavit, as is the case here. Rather, it held that a weakness in one area may be overcome by a strong showing in the other area. Petitioner submits that the magistrate had absolutely no indicia of reliability which would verify the hearsay allegations of an unknown, questionable informer, and, therefore, considering the totality of the circumstances, he had no probable cause to issue the search warrant.

B. The search warrant was based on facts that were materially false or recklessly made.

At the suppression hearing, the testimony established that several statements made by the affiants to the

magistrate were materially false representations and were known by the affiants to be false at the time they were made. Under such circumstances, the false material must be set aside. If the remaining content is insufficient to establish probable cause, the search warrant must be voided and fruits of the search excluded. Franks v. Delaware, 438 U.S. 152, 98 S.Ct. 267, 57 L.Ed.2d 667 (1978). Petitioner in this case asserts that, excluding the false statements from the affidavit, insufficient information remains in the affidavit on which probable cause could have been established.

Three material representations were made in the statement of underlying facts and circumstances:

(1) In paragraph three, there is a

statement that a vehicle involved in the illegal transportation of marijuana in Alcorn County, Mississippi, in September 1982 belonged to McCommon. As counsel developed at the suppression hearing, this information was based on hearsay, was not checked by affiants as to its veracity, and they actually had no idea to whom the car was titled.

(2) In paragraph four, affiants stated under oath that a confidential informer told Sgt. Barrett that McCommon was going to Miami "possibly" to pick up a load of drugs. The testimony at the suppression hearing was that the informer communicated with Ken Coleman, another agent with the Mississippi Bureau of Narcotics. Barrett had no first-hand information from the informer himself; rather, Barrett's information was

supplied second-hand through Coleman.

(3) Paragraph four states that McCommon was observed on October 4, 1982, at a Miami residence which "was occupied by a person known to the Drug Enforcement Administration as a Marine Smuggler." The testimony revealed that the alleged "marine smuggler" was one Mary (or Marie) Canovis. Canovis had never been convicted of any smuggling operation. Moreover, this residence belonged not to Canovis, but to a Richard Lopez, who had no drug connections. The only link between Canovis and McCommon was the fact that while McCommon was inside the Lopez house, an automobile registered to Canovis was parked outside.

Striking these items of deliberately falsified information from the affidavit, there is clearly insufficient information

in the statement of underlying facts and circumstances to constitute probable cause to issue the search warrant.

C. The search warrant was not issued by a neutral and detached magistrate.

Petitioner finally contends that the Justice Court Judge who issued the search warrant in question, was not a neutral and detached magistrate, as required by Aguilar v. Texas, supra, and United States v. Leon, 104 S.Ct. 3405 (1984).

The testimony of the Justice Court Judge at the reopening of the hearing on the motion to suppress, bears eloquent witness to the fact that the magistrate's decision to issue the search warrant was based primarily on the law enforcement

status of the persons making the request, rather than on the facts which were before him.

> Q. You would have issued it anyhow?
>
> A. Certainly, because the officer -- you've got to have enough faith and confidence in the officer that's asking for the search warrant to warrant it for him and then it is proves it's invalid, well, or whatever, there's nothing there what they're hunting -- that's not the first time I ever made a Search Warrant.
>
> Q. So, you were relying on the fact that these officers were of the law --
>
> A. Of the law sworn --
>
> Q. -- and they were in there -- they were sworn officers --
>
> A. That's right.
>
> Q. -- they were in there telling you that this fellow was a drug dealer and they wanted to search his car --
>
> A. That's exactly right.
>
> Q. -- and you relied on that

rather than any particulars of this thing?

A. That's right.

Q. Had you ever seen these officers before?

A. No, sir.

Q. You had never seen them before?

A. Not to know that they were drug officers.

Q. All right.

A. No, sir.

Q. So, you really issued the Search Warrant because you were asked for it by two sworn officers of law rather than any particular thing they told you?

A. Well, I based my decision not primarily on that, but because -- if Sheriff Jones walked in there and said, "Judge, I need a Search Warrant to search John Doe for Marijuana," drugs or whatever -- liquor or whatever it might be, I'm going to go on his word because he's -- I take him to be an honest law enforcement officer and he needs help to get in to search these places and it's my duty to help him to

fulfill that.

Q. Okay. And it's really based on the request other than any particular thing he might tell you?

A. That's right. That's right.

Q. And that's what the situation was here?

A. Well, if I didn't feel like it was warranted, now, then, naturally, I wouldn't issue it.

Q. Okay, but it was pretty -- it was -- the swaying fact was that this was two sworn officers of the law rather than anything they told you in these Underlying Facts and Circumstances?

A. That's right. They were officers of the Narcotics.

Petitioner believes that this exchange is a clear indication that the issuing magistrate was not neutral and detached, but prejudiced in favor of law enforcement officers. Any issuing magistrate who fails to consider

seriously the allegations before him in an affidavit for a search warrant, weighing the statement of underlying facts and circumstances in an impartial and objective manner in order to determine its sufficiency under the law, but issues a search warrant admittedly on the strength of the law enforcement status of the men requesting the warrant, cannot be said to be "neutral and detached."

Conclusion

A full reading of the trial transcript indicates that no witness saw any illegal drug activity conducted by Jerry McCommon. The only evidence supporting a conviction in this case was the contraband seized during an illegal search of McCommon's automobile and introduced into evidence at this trial.

The multiple constitutional defects surrounding the issuance of the search warrant and the seizure of the contraband from Petitioner's car rendered the search warrant void and the evidence seized thereunder inadmissible at trial. Without this evidence, no conviction of this Petitioner could stand. This Court should grant certiorari to review the Fourth Amendment violations committed by the courts of Mississippi against Jerry McCommon.

RESPECTFULLY SUBMITTED,

JERRY McCOMMON, PETITIONER

BY:_____

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105 North State Street
Jackson MS 39201
Tel. 601-354-0770

CERTIFICATE OF SERVICE

I, Samuel H. Wilkins, Esq., attorney for Petitioner, hereby certify that I have this date served a true and correct copy of the foregoing Petition for Writ of Certiorari upon Counsel for Respondent, The Hon. Edwin Lloyd Pittman, Attorney General of the State of Mississippi, P. O. Box 220, Jackson, Mississippi 39205.

This _____ day of June, 1985.

_____
Samuel H. Wilkins

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,240

JERRY McCOMMON

V.

STATE OF MISSISSIPPI

EN BANC

DAN LEE, JUSTICE, FOR THE COURT:

Jerry McCommon stands convicted of being a rather uncommon carrier. A jury in the Circuit Court of Simpson County found him guilty of knowingly possessing more than one kilogram of marijuana. The marijuana was discovered in the trunk of McCommon's car after law enforcement officer, acting on a tip from a confidential informer, followed McCommon to Miami, Florida and back to Simpson County.

After McCommon was detained officers

asked him where he had been. He told them that he had been on the Mississippi Gulf Coast camping. Knowing this to be a lie, and having other indicia of probable cause, two of the officers left the scene to secure a search warrant for McCommon's vehicle. McCommon was taken into custody and his vehicle was taken to the Simpson County courthouse. After a search warrant had been secured, McCommon's trunk was opened and four bales of marijuana were found therein. Following his conviction and sentence to a term of 15 years in the custody of the Mississippi Department of Corrections, with the last five years being on supervised parole, and a fine of $20,000, McCommon brings this appeal. McCommon's sole assignment of error relates to the search and seizure of his automobile. We

affirm.

PROBABLE CAUSE

In Lee v. State, 435 So.2d 674 (Miss. 1983), this Court adopted the totality of the circumstances test for determining the existence of probable cause which was articulated by the United States Supreme Court in Illinois v. Gates, ___U.S.___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). That test has subsequently been followed in Hall v. State, 465 So.2d 1303 (Miss. 1984) and Stringer v. State ___So.2d ___ (Miss. No. 54,805, decided February 27, 1985, not yet reported). As Stringer makes clear, the totality of the circumstances test applies whether we are construing the probable cause requirement of Section 23, Art. 3 of the Mississippi Constitution or that found in the Fourth Amendment to the

Constitution of the United States.

Under the totality of the circumstances test "[T]he task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place and the duty of a reviewing court is simply to insure that the magistrate had a substantial basis for . . . conclud-[ing] that probable cause existed." Lee at 676 and Stringer, slip at 8, quoting Gates at ___U.S.___, 103 S.Ct. 2332, 76 L.Ed.2d ___.

We are asked to decide whether,

under the totality of the circumstances, the justice court judge who issued the search warrant to search McCommon's vehicle was correct in deciding that the state had probable cause to believe that "contraband or evidence of a crime" would be found in Jerry McCommon's car. By simply reviewing the affidavit and the warrant on their face, the following facts support the state's assertion that probable cause was present. (1) In May, 1982, McCommon had been arrested for possession of cocaine. The search of his vehicle revealed a large amount of marijuana debris. (2) Information from a confidential source revealed that McCommon was driving to Miami, Florida and returning with large amounts of marijuana in his vehicle. (3) On July 13, 1982, two associates of McCommon were

arrested for possession of approximately 500 pounds of marijuana. One of the vehicles containing the marijuana belonged to McCommon. One of these associates had been in Miami, Florida at the same time as Jerry McCommon. (4) A confidential source told Sgt. Barrett of the Jackson Police Department, that McCommon was going to Miami, Florida "possibly to pick up a load of drugs." McCommon was followed to Florida and observed at a residence occupied by a person known to the United States Drug Enforcement Administration as a marine smuggler. When McCommon returned to Mississippi his vehicle was sagging in the rear although it had not done so on the trip to Florida. (5) When McCommon was stopped and questioned by authorities he told them that he had been on the

Mississippi Gulf Coast camping, a statement known by the police officers to be untrue. Given all of these circumstances, we conclude that there was probable cause to issue the search warrant.

WAS THE WARRANT ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE?

McCommon here argues that the issuing magistrate, Justice Court Judge Nevel Mangum, was not a neutral and detached magistrate. Both the United State Supreme Court and this Court have held that the individual issuing the warrant must be a neutral and detached magistrate. Johnson v. United States, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948); Birchfield v. State, 412 So.2d 1181 (Miss. 1982). A magistrate who fails to perform his neutral and detached

function and who serves "merely as a rubber stamp for the police" cannot validly issue a search warrant. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979).

Judge Mangum was called as a witness for the state during the suppression hearing in this cause. On cross-examination by the defense attorney, Judge Mangum testified that he relied primarily on the fact that the people who requested the warrant were sworn police officers rather than anything in particular in the affidavit of underlying facts and circumstances. Judge Mangum did add however, "Well, if I didn't feel like it was warranted, now, then, naturally, I wouldn't issue it."

McCommon asserts that the judge's testimony that he primarily relied on the

fact that sworn police officers were asking for the warrant is evidence that he was not a neutral and detached magistrate. We disagree. Judge Mangum's testimony that he primarily relied on the fact that sworn police officers were asking for the warrant is evidence that he was not a neutral and detached magistrate. We disagree. Judge Mangum's testimony that he would not have issued the warrant had he not thought it appropriate is evidence that he was not serving "merely as a rubber stamp for the police." We therefore find no merit in McCommon's argument; however, it is appropriate that we add a comment here for the benefit of both the bar and those state officials in whom resides the duty of issuing search warrants.

The importance of the neutral and

detached magistrate cannot be over emphasized. That magistrate stands as the barrier against unwarranted intrusions into the private lives and personal effects of the people. As the United States Supreme Court said in Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564, 569 (1971):

> [T]he warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, and important working part of our machinery of government, operating as a matter of course to check the 'well-intentioned but mistakenly overzealous executive officers' who are a part of any system of law enforcement.

We realize that the task of a

magistrate who issues search warrants is not an easy one. Their role requires detachment and study as they consider whether they have been presented with sufficient probable cause to issue a warrant to search or seize a particular person, place or thing. We fully appreciate the gravity of that role and are optimistic that those vested with that responsibility do likewise. The justice court judges, police judges and other judicial officers of the state called upon to issue warrants must remember that they are judges. On their oaths they may not issue warrants just to help law enforcement. They must always remember that a request for a warrant requires a judicial determination. Impartiality and reasoned application of legal principles are the foundation of a

judicial determination.

WAS IT ERROR TO ALLOW THE STATE TO AMEND ITS PROOF AND SUBSTITUTE A SIGNED COPY OF THE SEARCH WARRANT AND AFFIDAVIT AS OPPOSED TO THE UNSIGNED COPY ADMITTED DURING THE STATE'S CASE?

Curing the suppression hearing the state introduced a copy of the affidavit for a search warrant which was presented to Justice Court Judge Mangum. Following the close of the state's case the defense moved for a directed verdict based on the fact that those copies did not contain Judge Mangum's signature or seal. On the day of trial, the court allowed the state to amend the affidavits for a search warrant so as to insert the original into the record which contained the judge's signature. The judge testified that he

had signed those documents on October 6, 1982, the day they were issued.

In Powell v. State, 355 So.2d 1378 (Miss. 1978), this Court wrote:

> The other proposition argued is that the search warrant was fatally defective because the Justice Court Judge failed to sign the jurat of the affidavit. We find no merit in this argument. Undisputed testimony shows that the affiant appeared before Judge Dale, who put him under oath and obtained the information contained in the underlying facts and circumstances of the affidavit. After giving that information to the judge under oath, Pickens signed the affidavit and Dale wrote the date and his title at the bottom. Pursuant to the affidavit, Dale then issued the search warrant for the residence rented by appellant. The search warrant bears Dale's signature, which by reference incorporates the content of the affidavit.

355 So.2d at 1380.

In the instant case the undisputed testimony also showed that the affiants

were put under oath and Judge Mangum elicited the information which appeared in the affidavit from them. Under the authority of Powell we hold that no error occurred when the trial court allowed the state the opportunity to amend its proof and present the original jurat as opposed to the defective copy.

Based on all of the foregoing, we hereby affirm Jerry McCommon's conviction of possession of knowingly possessing more than one kilogram of marijuana.

AFFIRMED.

PATTERSON, C.J., AND PRATHER, ROBERTSON, SULLIVAN AND ANDERSON, JJ., CONCUR. ROY NOBLE LEE, P.J., CONCURS IN PART. HAWKINS, J. AND WALKER AND ROY NOBLE LEE, P.JJ., SPECIALLY CONCUR. ROBERTSON, J., CONCURS.

MINUTE BOOK "BX"

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MINUTES, SUPREME COURT OF MISSISSIPPI,

MARCH TERM, 1985.

WEDNESDAY, MAY 15, 1985, COURT SITTING:

JERRY McCOMMON

#55,240 v.

STATE OF MISSISSIPPI

This cause this day came on to be heard on Petition for Rehearing and this Court having sufficiently examined and considered the same en banc and being of the opinion that the same should be denied, doth order that said Petition be and the same is hereby Denied.

Affiants are Sgt. Jerry Barrett of the Jackson Police Dept. and Agent Steve Campbell of the Miss. Bureau of Narcotics with a total combined experience of approximately 15 years in drug enforcement involving the investigation and detection of illicit drug trafficking.

Affiants state that in May 1982, Sgt. Jerry Barrett arrested Jerry McCommon in Jackson, Ms. for possession of Cocaine. Subsequent (sic) of McCommon's vehicle revealed a large amount of Marijuana debris indicating that possibly a large amount of Marijuana had been in the trunk. Further investigation by Sgt. Barrett and information from a confidential source revealed that McCommon was driving to Miami, Fla., commonly referred to as the

drug capitol of the United States, and bringing back large loads of Marijuana in his vehicle.

On 7-13-82 two associates of Jerry McCommon were arrested in Alcorn County, Miss. for possession of approximately 500 pounds of Marijuana. One of the vehicles which contained the Marijuana belonged to Jerry McCommon. Investigation revealed through contacts with commercial airlines that one of the associates had flown via commercial air lines to Miami, Fla., and that Jerry McCommon was in Miami, Fla. at the same time through motel contacts in Miami.

On 9-29-82 McCommon flew to Jackson Airport and was met by his brother at the airport and Jerry McCommon drove away from the airport a new 1983 Mercury, Marquis, beige in color, Miss. license

number GEZ 986. This was observed by Sgt. Barrett. A Confiential (sic) source told Sgt. Barrett that McCommon was going to Miami, Fla., possibly to pick up a load of drugs. On 9-30-82 affiants and other MBN Agents followed McCommon to Miami, Fla. in MBN vehicles. On 10-4-82 McCommon was observed by affiants at a residence in Miami, Fla., who was occupied by a person known to the Drug Enforcement Administration as a Marine Smuggler. Affiant and other Agents followed McCommon back to Simpson County, Miss., noticing that the vehicle driven by McCommon was sagging in the rear of the vehicle. This was not the (sic) observed on the trip to Miami. When McCommon was stopped by Agents on U. S. Highway 49, in Simpson County, Miss. Agent Campbell asked McCommon where he

had been, and McCommon stated to Agent Campbell and other Agents that he had been to the Miss. Gulf Coast for approximately two days and stayed at KOA campground. Agent Campbell the (sic) asked McCommon permission to search McCommon's vehicle and McCommon refused to give consent.

With the above facts and circumstances, affiants respectfully request a search warrant be issued to search the 1983 Mercury Marquis, Miss. license, GEZ 986.

/s/ S.E. Campbell MBN 10-6-82

/s/ Sgt. J.W. Barrett, Jackson Police Dept., Miss. 10-6-82

(2)

NO. 85-8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JERRY McCOMMON,
Petitioner

vs.

STATE OF MISSISSIPPI,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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36 pp

QUESTIONS PRESENTED

1. Whether probable cause existed for issuance of a search warrant.

2. Whether the warrant was based upon facts that were materially false or recklessly made.

3. Whether the issuing magistrate was neutral and detached.

4. Whether the search warrant, whether valid or not, was necessary under the Carroll doctrine.

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NO. 85-8

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JERRY McCOMMON,
Petitioner,

VERSUS

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the Supreme Court of Mississippi affirming the conviction herein is reported at McCommon v. State, 467 So.2d 940 (Miss. 1985).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment IV, Constitution of the United States, is set out in the Petition.

Section 41-29-157(2), Mississippi Code of 1972 (in pertinent part):

> A search warrant shall issue only upon an affidavit of a person having knowledge or information of the facts alleged, sworn to before the judge or justice court judge and establishing the grounds for issuing the warrant. If the judge or justice court judge is satisfied that grounds for the application exist or that there is probable cause to believe they exist, he shall issue a warrant identifying the area, premises, building, or conveyance to be searched, the purpose of the search, and, if appropriate, the type of property to be searched, if any.

STATEMENT OF THE CASE

The Respondent adopts the Petitioner's Statement of the Case except for (1) the statement at page 7 of the Petition that "Several of the statements contained in this document [the Affidavit] were untrue and were known by the affiants to be untrue", and (2) the statement at page 8 that "The Justice Court Judge testified ...that he issued the warrant based on the fact that it was requested by two sworn officers of the law, rather than anything stated in the underlying facts and circumstances".

SUMMARY OF THE ARGUMENT

The Affidavit was more than adequate to establish the existence of probable cause to search the trunk of Jerry McCommon's car. The "two-pronged" test, urged by Petitioner, is inappropriate,and analysis should proceed under the "totality-of-the-circumstances" test, as was done by the Mississippi Supreme Court. The informant's tip was not fundamental to the establishment of probable cause in this case.

The facts claimed by the Petitioner to be "materially false or recklessly made" amount, at the most, to negligence or innocent mistake as to essentially peripheral matters.

The justice court judge who issued the warrant was not a model of neutrality and detachment; neither was he a rubber stamp for the police. The record supports the Mississippi Supreme Court's conclusion that his neutrality

and detachment were sufficiently established. In any event, the issuing magistrate's subjective feelings, whatever they may have been, do not present grounds for reversal of a conviction if, objectively, the Affidavit states an adequate basis for the finding of probable cause.

Even if the warrant should be found to be invalid, the conviction must stand because a warrantless search would have been permissible under the circumstances here since probable cause was present.

ARGUMENT

REASONS FOR DENYING THE WRIT

I.

THE SEARCH WARRANT WAS VALID.

A. THERE WAS PROBABLE CAUSE TO ISSUE THE SEARCH WARRANT.

The Affidavit in support of the application for the search warrant presented the following matters tending to establish probable cause: (1) The affiants were experienced narcotics law enforcement agents. (2) One of the agents, some five months earlier, had arrested McCommon in Jackson, Mississippi, for possession of cocaine. The search incident to that arrest had revealed a large amount of marijuana debris in the trunk of McCommon's vehicle, and the agent had been informed that McCommon was running marijuana from Miami, Florida, in his vehicle. (3) Some two months earlier, two persons described in the affidavit as associates

of McCommon had been arrested in Alcorn County, Mississippi, for possession of a large quantity of marijuana. The affidavit alleged that one of the vehicles involved in that arrest belonged to McCommon. Investigation had revealed that McCommon was in Miami at the time one of these persons arrived there by commercial airline.

(4) Southern Florida is a major gateway for illegal narcotics into the United States.

(5) The agents had observed McCommon arrive at the Jackson Airport and drive away. The agents were told by an informant that McCommon would be driving to Miami possibly to pick up a load of drugs. The agents had followed McCommon from the Jackson Airport to Miami and then back to Mississippi, confirming the informant's statement that McCommon would be driving to Miami and back. (6) In Miami, the agents had observed McCommon at a residence occupied by a person known to the D.E.A. as a "Marine Smuggler".

(7) On the way back from Miami, McCommon's vehicle had sagged in the rear, though it had not done so on the trip to Miami. (8) When stopped by the agents on the highway, McCommon had lied to them, stating that he was returning from a two-day camping trip on the Mississippi Gulf Coast.

The following matters tended to diminish the likely existence of probable cause: (1) The basis of the informant's knowledge was not stated. (2) The basis of the affiant's belief in the informant's reliability and credibility was not stated. (3) The informant's tip was not detailed. (4) The informant's tip was modified by the word "possibly". (5) The affiants did not actually see any drugs or any suspicious looking transfer at the residence in Miami, and therefore could not verify the informant's statement that McCommon's purpose was to pick up drugs. (6) Southern Florida, in addition to being a

center for narcotics activity, is a popular vacation area.

Under Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969), the sort of technical analysis of the informant's tip urged by the Petitioner here may have been in order. Respondent uses the word "may" because the informant's tip in this case did not have the kind of "fundamental place in this warrant application" as did the tip in Spinelli (supra, 393 U.S. 414, 89 S.Ct. at 588, 21 L.Ed.2d at 642), and because the affidavit here did not present the affiants' "mere conclusion" of illegal activity, as did the affidavit in Aguilar (supra, 378 U.S. at 113, 84 S.Ct. at 1513, 12 L.Ed.2d at 727).

The informant's tip in this case played a relatively small role in establishing probable cause. McCommon was known by these officers

prior to receipt of this informant's tip. Here, unlike the situations in Aguilar and Spinelli, the other parts of the affidavit supported the finding of probable cause. In addition, the tip was substantially corroborated by the fact that McCommon did drive to Miami and back to Mississippi, as the informant had said he would.

The Petitioner acknowledges that Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), has been decided but apparently urges that Aguilar/Spinelli is still the established method of probable-cause analysis. As the decision in Massachusetts v. Upton, ___ U.S. ___, 104 S.Ct. 2085, 80 L.Ed.2d 721 (1984), emphasizes, Gates and not Aguilar/Spinelli states the proper method of analysis.

The Mississippi Supreme Court deliberately and correctly applied the Gates "totality-of-the-circumstances" analysis and correctly found that probable cause was established and that the

trial judge properly overruled the motion to suppress. The affidavit provided a more than "substantial basis for the issuance of the warrant" and more than a "'fair probability that contraband or evidence of crime'", Upton, supra, ___ U.S. at ___, 104 S.Ct. at 2088, 80 L.Ed.2d at 727, would be found in the trunk of McCommon's car.

B. THE SEARCH WARRANT WAS NOT BASED UPON FACTS THAT WERE MATERIALLY FALSE OR RECKLESSLY MADE.

(1) The only witness who was cross-examined with regard to the allegations of the third paragraph of the affidavit (the arrest in Alcorn County) was Agent Coleman (R. 123-126, 134-135). Coleman was asked by defense counsel, "[H]ow do you know he [McCommon] owned that car?" Coleman answered, "The tag was registered in his name" (R. 124). Counsel asked, "Did you honestly believe this car was registered to Mr. McCommon?",

and Coleman answered, "Yes, Sir, I did" (R. 125). Petitioner misstates the situation by representing in his brief that it was developed at the suppression hearing that the agents "actually had no idea to whom the car was titled."

It is of small consequence that the agents' information as to the Alcorn County arrest was based on hearsay and was not personally checked by the agents as to its veracity. "[A]n affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant." Aguilar, supra, 378 U.S. at 114, 84 S.Ct. at 1514, 12 L.Ed.2d at 729.

(2) Petitioner does not state what difference it should have made to the issuing magistrate that the informant communicated with Agent Coleman rather than with the affiant, Agent Barrett. The agents were working closely with one another and had been throughout the operation.

The record does not demonstrate that the informant did not communicate with Barrett. The only testimony on the question was that of Coleman, who testified he did not know whether the informant had communicated with any officer or agent other than himself (R. 139-140).

(3) The affidavit did not allege that Mary (or Marie) Canovis owned the house but that it was "occupied by a person known to the Drug Enforcement Agency as a Marine Smuggler." The agents did believe that the woman they observed in the residence was Canovis, based on the fact that her car was parked outside the house (R. 64, 66).

The Petitioner has not shown that the affidavit contained any deliberate falsehood or reckless disregard for the truth. At the most, the Petitioner has alleged "negligence or innocent mistake", and such allegations are insufficient to overcome the presumption of validity with

respect to the affidavit. Franks v. Delaware, 438 U.S. 154, 171, 98 S.Ct. 2674, 2684, 57 L.Ed. 2d 667, 682 (1978).

C. THE SEARCH WARRANT WAS ISSUED BY A NEUTRAL AND DETACHED MAGISTRATE.

Justice Court Judges (formerly, justices of the peace) are among those judicial officers authorized by Section 41-29-157(2), Mississippi Code of 1972, to issue search warrants under the Mississippi Uniform Controlled Substances Law. Judge Mangum was acting within his statutory authority as a justice court judge for District Two of Simpson County, Mississippi (R. 150). The office of justice court judge is officially neutral and detached from the police and a justice court judge is not a prosecutor or law-enforcement officer. Cf, Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971).

There are two ways to view Judge Mangum's testimony at the suppression hearing. The Petitioner's view is that Judge Mangum said, in effect, that he issued the warrant because the affiants were law-enforcement officers.

Another view, and Respondent believes it is the better one, is that Judge Mangum was saying he believed the allegations made in the affidavit because the affiants were law-enforcement officers.

At the hearing, Agent Campbell testified, "I...typed up the Affidavit and gave it to Judge Mangum. He read it" (R. 47); "I basically told Judge Mangum the extent of the investigation and ...I typed up the Affidavit...and...I observed him read...those Underlying Facts and he then signed the Affidavit...and Search Warrant" (R. 56).

On cross-examination, defense counsel asked Judge Mangum, "Now, did you review these Underlying Facts and Circumstances before you signed

this Affidavit?", and the judge answered, "I did."

Counsel's next questions and the judge's answers are important to this analysis because they reveal that the judge did in fact consider the allegations in the affidavit and because they reveal that what the judge was talking about at the hearing was his acceptance of those allegations as true because the affiants were sworn law-enforcement officers:

> Q. Did you rely on everything in there before you issued this Search Warrant?
>
> A. I put the man under oath and I had no reason not to believe him.
>
> Q. Now, you say the 'man?'
>
> A. Or the men under oath, men under oath.
>
> Q. Okay, you put the men under oath?
>
> A. That's exactly right.

Q. And then based on what they told you--

A. That's exactly--that's the reason I--

Q. --you issued the Search Warrant?

A. That's right.

Q. Okay. Now, I notice a statement in here [regarding McCommon's presence at the residence in Miami]. Now, you had that information available to you?

A. That's right.

Q. And you believed that?

A. That's exactly right.

Q. And your belief on that statement is part of the reason you issued the Search Warrant?

A. That's right.

Q. Okay. Now, there is a statement in here [regarding McCommon's statement that he had been camping on the Mississippi Gulf Coast]. Okay, now, you relied on that statement as part of the reason for giving the Search Warrant?

A. Well, they--

Q. They told you he had lied about that, didn't they?

A. That's exactly right.

Q. Okay. And the fact that he had made that statement to him when they knew that that was a lie is part of the reason that you-- as underlying facts and circumstances that caused you to issue the Search Warrant?

A. Well, I had no reason not to believe them.

Q. I'm not saying whether or not you didn't believe them or not. I'm saying that those are some of the facts that caused you to issue the Search Warrant?

A. That's correct on their statement--

Q. Because they said, 'Okay, the man said he had been to the Gulf Coast, he had been to the KOA Campground, we know he's lieing [sic] because we followed him to Florida.' Okay, the fact that they told you that was part of the reason why you issued the Search Warrant--

A. That's correct.

Q. --because he had lied to them?

A. Exactly. After they had been placed under oath, now.

Q. I understand that. I'm not talking about when that sequence happened. I'm talking about the fact that they told you that he had lied about where he had been when they knew he had been to Miami and he had told them he had been to the KOA Campground and they knew he was lieing [sic] and they told you that you said, well, I think that's part of the reason why we ought to issue a Search Warrant, didn't you?

A. That's right.

Q. Okay. And they also told you that he had some associates arrested up in Alcorn County for possession of 500 pounds of Marijuana, didn't they?

A. I believe they made a statement to that fact.

Q. And you relied on that also? (Showing the witness.) Up at the top here.

A. (Witness examines the document.) Now, wait a minute. You're saying 500 pounds and it doesn't say anything about 500 pounds in this.

[At this point counsel and the witness became confused as to which paragraph of the

affidavit was being discussed (R. 162-164)].

Q. All right. Now, if, in fact, two associates of Mr. McCommon-- if the two people arrested in Alcorn County for possession of 500 pounds of Marijuana were not associates of Mr. McCommon, would that have made any difference to you?

A. No, I don't think it would.

Q. It wouldn't have made any difference? All right, if the fact that he had not been seen at the-- if he had not been to the residence in Miami, Florida, of a documented marine drug smuggler, would that have made any difference to you?

A. Yes, if they hadn't mentioned it, it would have made a difference.

Q. In other words--

A. When they stated that in the underlying facts there, that's more proof that they needed a Search Warrant.

Q. Okay. If they had not told you that--I'm going to read this and I'm going to read it while you're looking at it. If they had not made this statement, 'On October 4, 1982, McCommon was observed by affiants at a residence in Miami, Florida, who was occupied by a person known to The

> Drug Enforcement Administration as a Marine Smuggler,' now if that statement was not in there or if you knew that statement was not true, would that have made any difference in your issuing of this Search Warrant?
>
> A. No, it wouldn't.
> (R. 159-165).

[At this point begins the portion of Judge Mangum's testimony excerpted by the Petitioner in his brief (R. 165-167).]

Again and again Judge Mangum testified that he read and considered the allegations in the affidavit in deciding that probable cause existed; again and again he stated that he believed those allegations to be true because the affiants were law-enforcement officers and because they were under oath.

In ruling on the claim that Judge Mangum was not acting as a neutral and detached magistrate, the Mississippi Supreme Court found as follows:

> Judge Mangum was called as a witness for the state during the suppres-

sion hearing in this cause. On cross-examination by the defense attorney, Judge Mangum testified that he relied primarily on the fact that the people who requested the warrant were sworn police officers rather than anything in particular in the affidavit of underlying facts and circumstances. Judge Mangum did add however, 'Well, if I didn't feel like it was warranted, now, then, naturally, I wouldn't issue it.'

McCommon asserts that the judge's testimony that he primarily relied on the fact that sworn police officers were asking for the warrant is evidence that he was not a neutral and detached magistrate. We disagree. Judge Mangum's testimony that he would not have issued the warrant had he not thought it appropriate is evidence that he was not serving 'merely as a rubber stamp for the police.' McCommon v. State, 467 So.2d 940, 942 (Miss., 1985).

As the Petitioner's brief shows, Judge Mangum did say he felt it was his duty to help the police fulfill their duties, and Judge Mangum did answer "That's right" to the question, "And it's really based on the request other than any particular thing he might tell you?" (R. 166). These statements, read out of the context of

the judge's other testimony, cast the judge in an unfair light. Taking the judge's testimony as a whole, Respondent submits that Judge Mangum did "judge for himself the persuasiveness of the facts relied on by [the] complaining officer to show probable cause." Aguilar, supra, 378 U.S. at 113, 84 S.Ct. at 1513, 12 L.Ed.2d at 727, quoting Giordenello v. United States, 357 U.S. 480, 486, 78 S.Ct. 1245, 1250, 2 L.Ed.2d 1503, 1509 (1958).

That Judge Mangum's testimony revealed a pro-police, non-judicial attitude was recognized by the Mississippi Supreme Court, which expressed its strong disapproval of Judge Mangum's attitude in the majority opinion (467 So.2d at 942) and even more forcefully in the concurring opinion (467 So.2d at 943-945). The Court's response was both appropriate and adequate: the reviewing court's task was "merely [to] decid[e] whether the evidence as a whole provided a 'substantial basis' for the magistrate's finding of

probable cause" and not to conduct a "de novo probable cause determination." Upton, supra, ___ U.S. at ___, 104 S.Ct. at 2088, 80 L.Ed.2d at 727. "[T]he exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrate." United States v. Leon, ___ U.S. ___, ___, 104 S.Ct. 3405, 3418, 82 L.Ed.2d 677, 694 (1984).

Probable cause was fully present and fully established, and Judge Mangum's subjective state of mind, however viewed, provides no basis for reversal of this conviction. As stated by the trial judge,

> [I]n overruling the Motion to Suppress, it is my understanding that if there was sufficient evidence either in the statement made--written statement made by the officers or in the testimony that they gave to Judge Mangum to justify Judge Mangum to find probable cause, regardless of what his personal feelings were, I mean what made him do it, whether he had egg for breakfast or something bitter, I don't think would enter into it. I think if it's there,

then that is sufficient. (R. 170).

As stated in the specially concurring opinion of the Mississippi Supreme Court,

> It is also my view that the Constitution does not require a reviewing court to probe the state of mind of every magistrate who issues a search warrant, and the majority opinion should so state.
>
> In this case it is abundantly clear that the officers had probable cause to make the affidavit, and that the magistrate was furnished with facts constituting probable cause. Furthermore, he held an officially neutral and detached position from the officers.
>
> Neither the circuit judge nor we are required to go further. 467 So.2d at 946.

II.

EVEN IF THE SEARCH WARRANT WERE NOT VALID, THE EVIDENCE WAS ADMISSIBLE BECAUSE NO SEARCH WARRANT WAS NECESSARY.

Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), "holds a search

warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." Chambers v. Maroney, 399 U.S. 42, 51, 90 S.Ct. 1975, 1981, 26 L.Ed.2d 419, 428 (1970). In the present case, as in Carroll and Chambers, the search had to be made immediately without a warrant or the car had to be held for the length of time necessary to obtain the warrant: "Given probable cause to search, either course is reasonable under the Fourth Amendment." Id., 399 U.S. at 52. The later search at the jail was equally permissible. Texas v. White, 423 U.S. 67, 68, 96 S.Ct. 304, 305, 46 L.Ed.2d 209, 211 (1975).

Even if it were to be found that the search warrant herein was constitutionally insufficient,

the conviction is valid because the agents acted upon probable cause, as Respondent has argued above, under Part I-A. See also, California v. Carney, ___ U.S. ___, 37 Cr.L.Rptr. 3033 (1985); United States v. Johns, ___ U.S. ___, 36 Cr.L. Rptr. 3134 (1985).

CONCLUSION

Under the "totality-of-the-circumstances" analysis mandated by Gates and applied by the trial court and the Mississippi Supreme Court in this case, the affidavit was more than sufficient to justify the issuance of the search warrant. The record demonstrates that the issuing magistrate considered the allegations in the affidavit and based his decision to issue the warrant on his finding that the affidavit stated probable cause; he did not act as a rubber stamp for the police. It is the adequacy of the affidavit, and not the subjective feelings of the magistrate, that the reviewing court must consider in deciding whether the principles of the Fourth Amendment have been violated in a particular case, and even if the record showed (which this record does not) that the magistrate had failed to weigh and consider the affidavit's

allegations, no cause for reversal would be present.

The Respondent therefore respectfully submits that the Petition for Writ of Certiorari herein ought to be denied.

Respectfully submitted,

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CERTIFICATE

I, Wayne Snuggs, an Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing Brief in Opposition to the following:

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Counsel for Petitioner

This, the 3RD day of October, 1985.

/Wayne Snuggs
WAYNE SNUGGS

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

JERRY McCOMMON *v.* MISSISSIPPI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 85–8. Decided November 12, 1985

The petition for writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

It is well-recognized that the Fourth Amendment "imposes substantive standards for searches and seizures; but with them one of the important safeguards it establishes is a procedure; and [that] central to this procedure is an independent control over the actions of officers effecting searches of private premises." *Abel* v. *United States*, 362 U. S. 217, 251–252 (1960) (BRENNAN, J., dissenting). Thus this Court has long insisted that the determination whether probable cause exists to support a search warrant be made by "a *neutral* and *detached* magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948) (emphasis added). See also *United States* v. *Leon*, —— U. S. ——, 104 S. Ct. 3405, 3416–3417 (1984); *Illinois* v. *Gates*, 462 U. S. 213, 240 (1983); *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 326–327 (1979); *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977); *Shadwick* v. *City of Tampa*, 407 U. S. 345, 350 (1971); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 450 (1971); *Aguilar* v. *Texas*, 378 U. S. 108, 111 (1964); *Giordenello* v. *United States*, 357 U. S. 480, 486 (1958), *United States* v. *Lefkowitz*, 285 U. S. 452, 464 (1932). Just two Terms ago in *United States* v. *Leon*, *supra*, the Court vigorously reaffirmed that the probable cause decision must be made by a neutral and detached magistrate, stating that "the courts must . . . insist that the magistrate purport

to 'perform his "neutral and detached" function and not serve merely as a rubber stamp for the police.'" *Id.*, at ——, 104 S. Ct., at 3417 (quoting *Aguilar* v. *Texas*, *supra*.). And, as we explained in *Shadwick* v. *City of Tampa*, *supra*, at 350, "whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." Today the Court refuses to act on its convictions, denying certiorari in a case in which the judge who issued the search warrant indisputably "rubber stamped" the police request.

In this case, a large quantity of marijuana was discovered in the trunk of petitioner's automobile when it was searched pursuant to a warrant. Petitioner challenged the validity of the warrant at a pre-trial suppression hearing, arguing that it was not supported by probable cause. The judge who granted the warrant testified at the hearing. With remarkable candor, he explained that he had relied principally on the fact that *police officers* had asked for the warrant, rather than on the underlying facts and circumstances set forth in the affidavit. The pertinent portion of the judge's testimony on cross-examination follows:

> "Q. You would have issued [the search warrant even if a certain statement in the affidavit either had not been included or the judge had known it not to be true]?
> A. Certainly, because the officer—you've got to have enough faith and confidence in the officer that's asking for the search warrant to warrant it for him and then it proves it's invalid, well, or whatever, there's nothing what they're hunting—that's not the first time I ever made a Search Warrant.
> Q. So, you were relying on the fact that these officers were of the law—
> A. Of the law sworn—
> Q. —and they were in there—they were sworn officers—
> A. That's right.

Q. —they were in there telling you that this fellow was a drug dealer and they wanted to search his car—
A. That's exactly right.
Q. —and you relied on that rather than any particulars of this thing?
A. That's right.

. . . . .

Q. So, you really issued the Search Warrant because you were asked for it by two sworn officers of the law rather than any particular thing they told you?
A. Well, I based my decision not primarily on that, but because—if Sheriff Jones walked in there and said, 'Judge, I need a Search Warrant to search John Doe for Marijuana,' or drugs or whatever—liquor or whatever it might be, I'm going to go on his word because he's—I take him to be an honest law enforcement officer and he needs help to get in to search these places and it's my duty to help him fulfill that.
Q. Okay. And it's really based on the request other than any particular thing he might tell you?
A. That's right. That's right.
Q. And that's what the situation was here?
A. Well, if I didn't feel like it was warranted, now, then, naturally, I wouldn't issue it.
Q. Okay, but . . . the swaying fact was that this was two sworn officers of the law rather than anything they told you in these Underlying Facts and Circumstances?
A. That's right. They were officers of the Narcotics."

The trial court rejected petitioner's arguments and admitted the evidence. The Mississippi Supreme Court affirmed petitioner's conviction, holding both that the warrant was supported by probable cause and that the conduct of the judge who signed the warrant, although not a model of judicial deportment, had satisfied the constitutional requirements of detachment and neutrality.

The respondent argues before this Court that even if the judge failed to evaluate the request for the warrant in a neutral and detached fashion, the warrant was nonetheless valid because it was, in fact, supported by probable cause.* This attempt to evade review of the judge's lack of independence should not succeed. In *Coolidge* v. *New Hampshire*, 403 U. S., at 450–451, we firmly rejected the argument that "the existence of probable cause renders noncompliance with the warrant procedure an irrelevance." Indeed, in *Coolidge* the Court declared that because the warrant was not issued by "the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all." *Id.*, at 453.

As the transcript of the suppression hearing clearly demonstrates, the judge who issued the warrant to search petitioner's automobile, although formally separate from law enforcement officials, viewed himself as a facilitator of police investigations and simply acquiesced in police requests, without giving serious and independent consideration to the facts set forth in supporting affidavits. The Court's failure to grant certiorari in this case suggests that our admonitions that probable cause must be determined by a neutral and detached magistrate are hollow pronouncements.

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*Relying on *Carroll* v. *United States*, 267 U. S. 132 (1925), *Chambers* v. *Maroney*, 399 U. S. 42 (1970), and *Texas* v. *White*, 423 U. S. 67 (1975), respondent also argues that the instant case involves an automobile search that is supported by probable cause and thus no search warrant was required. Apart from my view that automobile searches presenting no exigent circumstances should be fully subject to the Fourth Amendment's warrant requirement, *see, e. g.*, *United States* v. *Johns*, —— U. S. ——, —— (1985) (BRENNAN, J., joined by MARSHALL, J., dissenting); *United States* v. *Ross*, 456 U. S. 798, 836–37 (1982) (MARSHALL, J., joined by BRENNAN, J., dissenting); *South Dakota* v. *Opperman*, 428 U. S. 364, 384 (1976) (MARSHALL, J., joined by BRENNAN, J., and Stewart, J., dissenting), respondent may not be heard to make this argument since it appears that it was not advanced below, *see, e. g.*, *Illinois* v. *Gates*, 462 U. S. 213, 221–224 (1983).

I find the Court's refusal to take this case particularly disturbing in light of the good faith exception to the Fourth Amendment exclusionary rule created by *United States* v. *Leon*, —— U. S. ——. In *Leon*, the Court held that physical evidence seized by police officers reasonably relying upon a warrant issued by a detached and neutral magistrate is admissible in the prosecution's case-in-chief, even though a reviewing court has subsequently determined that the warrant was defective or that the officers failed to demonstrate when applying for the warrant that there was probable cause to conduct the search. The Court justified its holding to a large extent on the special protective role that a neutral and detached magistrate plays in safeguarding the Fourth Amendment right against unreasonable searches and seizures, *id.*, at ——, 104 S. Ct. 3416–3419. In fact, the Court indicated that suppression of evidence is appropriate where "the magistrate [has] abandoned his detached and neutral role," *id.*, at ——, 104 S. Ct. 3423. In my dissent, I warned that creation of a good faith exception implicitly tells magistrates that they need not take much care in reviewing warrant applications, since their mistakes will have virtually no consequence, *id.*, at ——, 104 S. Ct. 3444. Today the Court tacitly informs magistrates that not only need they not worry about mistakes, they need no longer be neutral and detached in their review of supporting affidavits. The combined message of *Leon* and the Court's refusal to grant certiorari in this case is that the police may rely on the magistrates and the magistrates may rely on the police. On whom may citizens rely to protect their Fourth Amendment rights?

I would grant certiorari and summarily reverse, or at least set the case for oral argument.